

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:TL-N-2262-01
JMMarr

date:

to: Audie Sturla, Group Manager, Employment Tax
Tony Lloren, Employment Tax Specialist
FE: 1417, Santa Ana

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from: Joyce M. Marr, Attorney (LMSB)
June Y. Bass, Associate Area Counsel (LMSB)

subject: [REDACTED] (formerly known as [REDACTED])
EIN: [REDACTED]
Issue: Securing Forms SS-10 for [REDACTED] and [REDACTED]
Statute of Limitations: [REDACTED]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated April 5, 2001, as to the proper caption to use on Consents to Extend the Time to Assess Employment Taxes (Forms SS-10) for the employment tax liabilities of [REDACTED] and [REDACTED] [REDACTED] for the years [REDACTED] and [REDACTED]. This memorandum should not be cited as precedent.

In addition, we have also reviewed the Forms SS-10 currently in effect for [REDACTED] and [REDACTED] [REDACTED] for the years [REDACTED] and [REDACTED], attached hereto as Exhibits A and B, extending the statute of limitations to [REDACTED].

Issues

1. Whether the Forms SS-10 currently in effect for [REDACTED] and [REDACTED] for the years [REDACTED] and [REDACTED] are valid?

2. What are the proper captions to use on Forms SS-10 to be secured for employment tax liabilities of [REDACTED] and [REDACTED] for the years [REDACTED] and [REDACTED]?

Conclusions and Recommendations

1. Yes, the Forms SS-10 extending the assessment period for [REDACTED] and [REDACTED] are valid even though they are erroneously captioned. You should, however, inform the surviving successor to [REDACTED], i.e., [REDACTED], of the error in the captions before obtaining a further extension.

2. The Form SS-10 to be secured for [REDACTED] (EIN: [REDACTED]) should be captioned "[REDACTED] (EIN: [REDACTED])¹, as the successor to [REDACTED] (EIN: [REDACTED]) (formerly known as [REDACTED]).*" At the bottom of the first page of the Form SS-10, the following language should be added: "*This is with respect to the tax liabilities of [REDACTED] reflected above on lines (1)(a) through (1)(c), inclusive."

The Form SS-10 to be secured for [REDACTED] -- [REDACTED] (EIN: [REDACTED]) should be captioned "[REDACTED] (EIN: [REDACTED])², as the successor to [REDACTED] (EIN: [REDACTED]) (formerly known as [REDACTED]), as the successor to [REDACTED] (EIN: [REDACTED]).*" At the bottom of the first page of the Form SS-10, the following language should be added: "*This is with respect to the tax liabilities of [REDACTED] reflected above on lines (1)(a) through (1)(c), inclusive."

Since the requirements of I.R.C. § 6501(c)(4)(B), pertaining to giving the taxpayer notification of certain rights, must be satisfied, please ensure that the statute extensions are requested by the most recent revision of Form Letter 907 or 967.

¹ The EIN which we have set forth is the EIN shown on [REDACTED]'s Form 8-K dated [REDACTED], which we downloaded from LEXIS. When preparing the Form 870-AD, please verify that this is the EIN for [REDACTED] according to the Service's records.

²See supra note 1.

Facts

[REDACTED] (EIN: [REDACTED]), formerly known as [REDACTED], was a parent corporation of [REDACTED] (EIN: [REDACTED]).

By virtue of a tender offer followed by a merger transaction, [REDACTED] (EIN: [REDACTED]), became the parent corporation of [REDACTED] effective [REDACTED]. [REDACTED] filed its initial income tax return for the short period beginning [REDACTED] and ending on December 31, [REDACTED]. On this short-period return, [REDACTED] stated that it was incorporated on [REDACTED]. The return was filed on a consolidated basis and [REDACTED] was included on the Affiliations Schedule (Form 851). [REDACTED] also included [REDACTED] (EIN: [REDACTED]) on the Affiliations Schedule for the consolidated return it filed for the short period ended December 31, [REDACTED]. [REDACTED] also included [REDACTED] (EIN: [REDACTED]) and [REDACTED] (EIN: [REDACTED]) on the Affiliations Schedule for a short-period return filed by it for the tax year beginning January 1, [REDACTED], and ending [REDACTED].

[REDACTED] was an indirect subsidiary of [REDACTED], a German corporation which is the ultimate parent of a large multinational group of companies. On [REDACTED], as part of an internal reorganization of the [REDACTED] group corporate structure, all of the shares of [REDACTED] were transferred to [REDACTED], a Delaware corporation.

On the Affiliations Schedule for [REDACTED]'s consolidated income tax return, [REDACTED] included [REDACTED], [REDACTED] and [REDACTED].

Affixed hereto as Exhibit C is an organizational chart showing that as of [REDACTED]: (1) [REDACTED]'s parent corporation was [REDACTED]; and (2) [REDACTED]'s parent corporation was [REDACTED], a Delaware corporation, a first tier subsidiary of [REDACTED].

According to information we have retrieved from LEXIS, which is affixed hereto as Exhibit D, [REDACTED] was merged with and into [REDACTED] on [REDACTED]. Also affixed hereto as Exhibit E is information retrieved from the California Secretary of State website which

confirms that [REDACTED] merged out of existence.

Effective [REDACTED], pursuant to Section 905 of the Business Corporation Law of the State of New York, [REDACTED] was merged with and into [REDACTED]. Affixed hereto as Exhibit F is a copy of the relevant "Certificate of Merger."

Executed Forms SS-10 for [REDACTED] and [REDACTED]

In [REDACTED], the Service secured a Form SS-10 with a rider, in accordance with the procedures set forth in Rev. Proc. 72-38, 1972-2 C.B. 813, for employment taxes for the year [REDACTED]. This Form SS-10 was captioned in the name of "[REDACTED] (Formerly: [REDACTED])" and referenced EIN [REDACTED]. In addition, the signature block reflects the "Corporate Name" as "[REDACTED] [sic] [REDACTED] (Formerly [REDACTED] [sic])." Among the subsidiaries listed on the rider were [REDACTED] and [REDACTED]. The rider also shows the respective EINs for these entities. This Form SS-10 was signed by [REDACTED] ([REDACTED]). According to [REDACTED]'s Annual Report, which we downloaded from LEXIS, [REDACTED] was [REDACTED]'s Vice President of [REDACTED]. According to an excerpt of minutes of a meeting of [REDACTED]'s Board of Directors held in [REDACTED], [REDACTED] was elected Treasurer and Assistant Secretary of [REDACTED].

In [REDACTED], the Service secured a Form SS-10 with a rider, in accordance with the procedures set forth in Rev. Proc. 72-38, 1972-2 C.B. 813, for employment taxes for the years [REDACTED] and [REDACTED]. This Form SS-10 was captioned in the name of "[REDACTED] (formerly: [REDACTED] [sic])" and referenced EIN [REDACTED]. In addition, the signature block reflects the "Corporate Name" as "[REDACTED] (formerly: [REDACTED])." Among the subsidiaries listed on the rider were [REDACTED] and [REDACTED]. The rider reflects the respective EINs for these entities. This Form SS-10 was signed by [REDACTED] ([REDACTED]), the Senior Vice President - Finance and Treasurer, Chief Financial Officer of [REDACTED]. The taxpayer's contact person for the current audit, [REDACTED], has represented to employment tax agent Tony Lloren that [REDACTED] was also an officer of [REDACTED].

Additional Forms 872 for [REDACTED] and [REDACTED]

You now wish to further extend the assessment period for the [REDACTED] and [REDACTED] employment taxes of [REDACTED] and [REDACTED] to [REDACTED].

Discussion

1. Validity of the executed Forms SS-10

Generally the Service must make an assessment of tax within three years after the return is filed. See I.R.C. § 6501(a). However, I.R.C. § 6501(c)(4) authorizes an extension of the period of limitations for assessment, provided that the agreement is executed prior to expiration of the limitation period then in effect. If a period of limitation specified by statute has already expired, it cannot be extended by agreement. Treas. Reg. § 301.6501(c)-1(d); Rev. Rul. 85-67, 1985-1 C.B. 364; See also United States v. Garbutt Oil Co., 302 U.S. 528, 533-34 (1938). Hence, if the Forms SS-10 secured by the Service for [REDACTED] and [REDACTED], were invalid, the Service would not by another Form SS-10 be able to re-institute the assessment period for the [REDACTED] and [REDACTED] employment taxes, which would have already expired.

In this case, captions and signature blocks on the Forms SS-10 secured in [REDACTED] and [REDACTED] are incorrect. [REDACTED]'s name was not changed to [REDACTED]. Rather, [REDACTED] was a subsidiary of [REDACTED]. The captions should have read: "[REDACTED]." Despite the caption error, for the reasons below, we do not believe this defect is fatal to the validity of the forms.

A. Both Taxpayer and the Service intended the Forms SS-10 at issue to extend the assessment period for the [REDACTED] and [REDACTED] employment taxes of [REDACTED] and [REDACTED]

Although a Form SS-10 is not considered to be a contract, courts have nevertheless applied contract principles in determining the validity of consents to extend the statute of limitations because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). The term agreement means a manifestation of mutual assent. Piarulle, supra, at 1042. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

In this case, the undisputed facts clearly establish that both the Service and Taxpayer intended the Forms SS-10 at issue to extend the assessment period for [REDACTED] and [REDACTED] employment taxes of [REDACTED] and [REDACTED]. These entities with their respective EINs are listed on the riders affixed to the Forms SS-10 and the riders state that the Forms SS-10 are to have the same force and effect as if separate Forms SS-10 were executed by each of the entities listed thereon. The reference to "[REDACTED]" (Formerly: [REDACTED]) in the caption apparently was the result of a mutual mistake³ of the parties.

The erroneous captions and signature blocks may result in confusion as to whether the Forms SS-10 relate to [REDACTED], or [REDACTED], since they were separate entities. However, the Forms SS-10 refer to tax periods from January 1, [REDACTED], to December 31, [REDACTED], and January 1, [REDACTED] to December 31, [REDACTED], although [REDACTED] did not come into existence until [REDACTED]. Hence, the references to "[REDACTED]" (Formerly: [REDACTED]), " must refer to [REDACTED], not [REDACTED].

- B. The Forms SS-10 may be revised to conform with the parties' intention under the doctrine of equitable reformation.

Where a Form SS-10 does not conform with the actual agreement between the parties, a court may reform the contents to conform with the intention of the parties. Woods v. Commissioner, 92 T.C. 776, 789(1989).

In Woods, the taxpayers executed a Form 872 for the 1978 tax year. The Form 872 was limited to adjustments relating to the taxpayer's investment in an S-corporation. Subsequently, the taxpayers executed a Form 872-A which failed to reflect the correct name of the S-corporation. The Tax Court found that at the time each extension was executed, both the taxpayers and the Service intended that the extensions would allow the Service additional time to complete its examination of the taxpayers'

³ A mutual mistake exists "where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties." Woods v. Commissioner, 92 T.C. 776, 782 (1989), quoting Black's Law Dictionary 920 (5th ed. 1979).

1978 tax return. The Tax Court held that the Form 872-A contained a mutual mistake of fact and therefore reformed the Form 872-A to reflect the parties' actual agreement.

Here, the previously executed Forms SS-10 also contained a mutual mistake of fact in that the captions mistakenly identified the taxpayer as "[REDACTED] (Formerly: [REDACTED])". Such defect is a mere drafting error and a court should reform the forms to reflect the proper captions. The Forms SS-10, therefore, effectively extend the assessment period for [REDACTED] and [REDACTED] employment taxes of [REDACTED] and [REDACTED] to [REDACTED], thereby allowing the Service to secure a further extension at this time. You should, however, inform the surviving successor to these entities, i.e., [REDACTED], of the error in the captions before obtaining a further extension.

II. Captions on Forms SS-10 to be secured

Section 906(b)(3) of the Business Corporation Law of the State of New York provides, in pertinent, that when a merger is effected, "[t]he surviving ... corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities." Thus, under New York law, [REDACTED], as the successor to [REDACTED] and as a successor to the successor to [REDACTED], is liable for the tax liabilities of [REDACTED] and [REDACTED].

Hence, you should obtain Forms SS-10 from [REDACTED] with regard to the liabilities of [REDACTED] and [REDACTED]. The Forms SS-10 should be captioned as set forth above under the heading "Conclusions and Recommendations."

The signature blocks on the Forms SS-10 should be signed as follows:

For [REDACTED]: "[REDACTED], as the successor to [REDACTED]."

For [REDACTED]:
"[REDACTED], as the successor to [REDACTED], as the successor to [REDACTED]."

In the block on the Forms SS-10 labeled "Taxpayer Identification Number," the EIN of [REDACTED] should be entered.

Please ensure that [REDACTED] is still in existence when the Forms SS-10 are secured from it.

The Forms SS-10 should be executed by an authorized officer of [REDACTED] Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul 84-165, 1984-2 C.B. 305 (the Service will apply the rules applicable to the execution of original returns to the execution of consents to extend the time to make an assessment).

This advice has been coordinated with the Office of Chief Counsel. With the rendition of this advice, we are closing our file. Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing.

JOYCE M. MARR
Attorney (LMSB)

Attachments: As stated